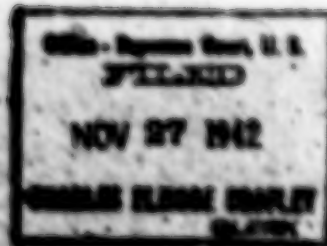


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No. 366

In the Supreme Court of the United States

OCTOBER TERM, 1942

THE UNITED STATES, PETITIONER

v.

BROOKS-CALLAWAY COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinions of the Court of Claims (R. 18-22) are not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered June 1, 1942 (R. 22). The petition for a writ of certiorari was filed on September 1, 1942, and was granted on October 19, 1942. Jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether the proviso to Article 9 of the Standard Form of Government Construction Contract

which provides that a contractor shall not be charged with liquidated damages for delays owing to unforeseeable causes beyond the control and without the fault of the contractor, including floods, contemplates the remission of liquidated damages for delay caused by high water which interferes with the progress of the work but which is customary and foreseeable.

CONTRACT PROVISION INVOLVED

Article 9 of the Standard Form of Government Construction Contract (R. 6; Fdg. 5, R. 13-14) provides:

ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the

work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: Provided further, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall*

be final and conclusive on the parties hereto.
[Italics ours.]

STATEMENT

Respondent brought suit in the Court of Claims (R. 1-4) to recover the sum of \$3,900, which had been deducted from the contract price as liquidated damages for delay in the completion of a contract for the construction of levees on the Mississippi River. It contended that liquidated damages had been improperly assessed because it had been delayed in the completion of the work by high water, among other causes. The material facts as found by the Court of Claims (R. 12-17) are as follows:

Brooks-Callaway Company entered into a Standard Form contract with the United States on October 12, 1931, whereby, for the consideration of 12¢ per cubic yard place measurement, it agreed to furnish all labor and material and perform all work required for the construction of the Missouri Bend Levee, Lots A, B, and C, containing approximately 2,300,000 cubic yards, and the St. Gabriel Levee, Lots A, B, and C, containing approximately 1,750,000 cubic yards, both of which projects were located on the Mississippi

The other causes alleged were failure of the United States to procure a necessary right-of-way and the requirement of the contracting officer early in 1933 that the company build a tie-in levee between the new construction and an old levee, in anticipation of spring floods (R. 2). The court below decided against respondent on these two claims (R. 20).

River. The contract provided that the work should be completed within 450 calendar days after the receipt of notice to proceed. (Fdg. 2, R. 12.) Such notice was given on October 22, 1931, and accordingly January 14, 1933, became fixed as the contract date of completion (Fdg. 6, R. 14). Article 9 of the contract (supra, pp. 2-4) provided for the deduction of liquidated damages for delay in completion of the work unless the delay was "due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy; acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather." The specifications of the contract provided that liquidated damages at the rate of \$20 per day should be assessed for every day of delay in completion in excess of the contract time. (R. 6, 7; Fdg. 5, R. 13-14.)

The Missouri Bend Levee was completed on March 22, 1933, and the St. Gabriel on August 25, 1933 (Fdg. 6, R. 14). Liquidated damages in the amount of \$5,800 for a total delay of 290 days were thereupon assessed against respondent and withheld from the contract price. Respondent protested against this deduction, and, upon consideration, the contracting officer found that respondent had been delayed by high water during the contract period for a total of 112 days on the Missouri Bend Levee, and for 4 days on

the St. Gabriel Levee. He further found that it had been delayed by high water after the contract period for 162 days on the St. Gabriel Levee. He held that of the total delay of 278 days owing to high water, 183 days were owing to conditions normally to be expected on account of high water and that 95 days were unforeseeable.² He therefore recommended that liquidated damages in the sum of \$1,900 be remitted (representing 95 days of unforeseeable delay at \$20 per day) but that the balance of \$3,900 be retained. Payment was made on that basis. (Fdg. 7, R. 14.)

The Court of Claims concluded that liquidated damages should not have been assessed against respondent for any of the 278 days of delay owing to high water (R. 18, 19) on the ground that the high water was a flood and under the contract all floods were unforeseeable. Judgment was given in favor of respondent (R. 22) for \$3,660, representing the 183 days of delay which the contracting officer had found resulted from foreseeable high water. Judge Madden dissented (R. 21-22), and in the course of his dissent pointed out that re-

² The contracting officer found (Fdg. 8, R. 14-16) that the remaining delay, being the difference between the total delay of 290 days and the delay of 278 days owing to high water, was not excusable on account of failure by the Government for a period to procure a necessary right-of-way or on account of the requirement made by the contracting officer in January 1933 that the contractor build a tie-in levee. On these points the court below sustained the conclusions of the contracting officer (see Fdgs. 9-13, R. 16-17; R. 19-20).

spondent's vice president had testified that in making its bid respondent had taken into consideration the fact that there would be high water which would cause work on the levee to stop.

SPECIFICATION OF ERRORS

The Court of Claims erred:

1. In holding that under Article 9 of the Standard Form of Government Construction Contract liquidated damages cannot be assessed against a contractor for normal expected delay caused by high water that was customary and reasonably foreseeable.

2. In entering judgment for the respondent.

SUMMARY OF ARGUMENT

The proviso of Article 9 of the Standard Form of Government Construction Contract relieves contractors from liquidated damages only as to delays caused by "unanticipated obstacles to prompt performance" (R. 21). In its absence, contractors would be liable for delays in performance caused by unforeseeable events, subject to some possible but vaguely defined exceptions which could not be established without litigation. The proviso was intended to do no more than place all delays from unforeseeable causes in the class of excusable delays. The specifically listed causes were designed to illustrate the all-inclusiveness of the unforeseeable causes intended to be covered, not to expand the unforeseeable causes to include some foreseeable causes.

The unreasonable consequences flowing from the construction placed on the proviso by the court below repel the suggestion that that is the intended construction. Among other such consequences of that construction is the consequence that it would virtually nullify the completion date provision in government contracts.

In any event, the term "floods" cannot be extended to include expected high water. The term has a connotation of unexpectedness which is reinforced by the context in which it is here used. Thus understood the term "floods" does not include foreseeable and expected high water.

ARGUMENT

ARTICLE 9 EXCUSES DELAYED PERFORMANCE ONLY WHERE THE DELAY IS DUE TO UNFORESEEABLE CAUSES

Respondent agreed to build two levees within 450 days (R. 12), and further agreed that if it failed to complete the work within that time the United States could either terminate the contract or permit respondent to continue work subject to the retention by the United States of liquidated damages (Article 9, *supra*, pp. 2-4). Had the contract provided no more, respondent would have been subject to these sanctions for any delay caused by unforeseeable events² except possibly

² *Maryland Dredging Co. v. United States*, 241 U. S. 184; *Porto Rico Sugar Co. v. Lorenzo*, 222 U. S. 481; *Jones v. United States*, 96 U. S. 24; *The Harriman*, 9 Wall. 161; *Dermott v. Jones*, 2 Wall. 1.

those which were acts of God.' Whether an unforeseeable flood is an act of God and if so whether it would excuse delay appears to be in law an open and hence litigable question.' That respondent would also have assumed liability for delay due to causes which were or should have been foreseen is too clear for question.'

However, the Standard Form of government contract, to which respondent was a party, relieves the contractor of liability for delays "due to unforeseeable causes beyond the control and without the fault or negligence of the contractor * * *." The fairness of such a provision is manifest, and it has the dual advantage of avoiding litigation and of making government contracts more attractive than they otherwise would be, thus affording lower bids and a greater selection of bidders.

In order that a narrow construction (such as limiting it to acts of God) may not be placed on

¹ *Columbus Ry. & Power Co. v. Columbus*, 249 U. S. 399, 412 (dictum); *Dermott v. Jones*, 2 Wall. 1, 7 (dictum); see, however, *Phoenix Bridge Co. v. United States*, 38 C. Cls. 492, affirmed 211 U. S. 188, *Jones v. United States*, *supra*, note 3. Compare *Day v. United States*, 245 U. S. 159.

² In the sense in which lightning is an act of God, a flood is also one, but so are fires of indeterminate origin and adverse weather conditions, which nonetheless are risks assumed by a contractor. *Jones v. United States*, *supra*, note 3; *Williston Contracts* (Rev. ed.), sec. 1964. Compare *Day v. United States*, *supra*, note 4.

³ Compare *Carnegie Steel Co. v. United States*, 240 U. S. 156.

this clause, Article 9 proceeds to particularize a few of the unforeseeable interferences against which the contractor does not guarantee: thus it describes these unforeseeable causes as "including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes." From the context of Article 9 as well as from its purpose, it seems apparent enough that this language was designed to show that the reference to unforeseeable causes was all-inclusive, and whatever their nature if the causes were unforeseeable the contractor's delay was to be excused. This provision was thus not intended to relieve respondent from liability for liquidated damages on account of its delay, since the delay here was caused by foreseeable high water.

The Court of Claims, however, was of the opinion that the word "including" was a word of addition, not of illustration, and that the effect of Article 9 was to define as "unforeseeable" all causes listed, such as fires, floods, strikes, and delays of subcontractors due to any of those causes, even though they be in a particular case foreseeable or, for that matter, foreseen. As we

¹ The Court of Claims cited as authority *Montello Salt Co. v. Utah*, 221 U. S. 452, in which the State of Utah argued that the word "including" in a government grant was a word of addition. This Court held that it was not. See also *Federal Land Bank v. Bismarck Lumber Co.*, 314 U. S. 95, 100.

have seen, this construction is inconsistent with the apparent purpose of the provision. In addition, it has such unreasonable consequences as to repel the possibility that it is the intended construction. Moreover, the particular word (floods) which occasioned this construction itself has connotations of unexpectedness which should prevent its being held to include foreseeable high water.

1. THE UNREASONABLE CONSEQUENCES OF THE LOWER COURT'S CONSTRUCTION OF ARTICLE 9 SHOW THAT THE PARTIES DID NOT INTEND THAT SUCH A CONSTRUCTION SHOULD BE ADOPTED

The decision below holds that delay due to any of the expressly listed causes is excusable delay even though the cause be not in fact "unforeseeable * * * beyond the control and without the fault or negligence of the contractor." Logically applied, the decision would even excuse listed delays which were within the control or caused by the fault of the contractor. Among the listed causes are "fires, floods, * * * strikes, * * * or delays of subcontractors due to such causes." Under the construction adopted below, a contractor is free to make a low bid in which profit is entirely dependent on his using highly inflammable materials in an existing factory which is not properly fireproofed. If a fire destroys the factory, the contractor can then wait for his factory to be rebuilt, and if that wait causes the government work to be delayed beyond the contract period, the delay is excusable even though reasonably foreseeable. Or, as another

example, if a contractor in wilful violation of the National Labor Relations Act discriminates against union labor in employment and advancement policies, and strikes result, delays from those strikes will be excusable. These causes of delay are foreseeable, and furthermore are not "beyond the control" and are not "without the fault * * * of the contractor," yet under the decision below they would be excusable causes because they are expressly listed. And the United States would be powerless even to terminate the contract, since under Article 9 the contract cannot be terminated, or liquidated damages retained, if the delay is from an excusable cause.

The foregoing examples show the unreasonable consequences, clearly not intended, which can flow from Article 9 unless it be construed to excuse only those delays which are caused by unforeseeable events.

Hypothetical examples are not needed. The facts of the instant case demonstrate the point. The instant contract called for completion within 450 days (R. 12). Under normal conditions there would be high water during 183 days (R. 18), thus leaving 267 days in which high water would not interfere with the work. It could, therefore, be foreseen that the contractor would have only 267 working days in which to complete the levees. It takes more men and more equipment to build a levee in 267 days than it does in 450 days since

the same amount of work must be done in a shorter time. Thus more men must be employed and more equipment obtained by the contractor who plans to build a levee in 267 working days than by the one who plans on 450 working days. The contractor who counts on having 267 working days will therefore have more men and equipment lying idle during high water than the contractor who counts on 450 working days. As a result the stand-by charges of the former contractor will be higher than those of the latter. Since the former will anticipate these charges he will budget for them as well as for the cost of the extra equipment in preparing his bid. Thus, the contractor who counts on 450 working days can underbid the one who knows he cannot expect more than 267 working days. The result is that the contractor who counts on having 450 working days will get the contract, and if any of the anticipated high water occurs the contract will not be completed on time. Under Article 9 as construed below, the United States will be unable either to terminate the contract or to retain liquidated damages.

The inevitable effect of the construction adopted below would be to make a mockery of the completion date in a Standard Form contract wherever foreseeable delays occur due to any of the specifically listed causes. The bidder who ignores the possibility of delays from such causes can usually be low bidder, so the contract will go

to one who, if the expected delays occur, cannot complete within the specified time. Such a construction is frustrative of the purpose of Article 9. It certainly is not the intended construction.

Albina Marine Iron Works v. United States, 79 C. Cls. 714, relied on by respondent, appears to be distinguishable. In that case the contracting officer found that the delay was due to "unusual weather conditions," but he held that the contractor should have anticipated some delay from this source. There may thus have been a conflict between his findings since "unusual" weather unless found to the contrary connotes unforeseeable weather, and the court so held. On any other construction, the *Albina Marine Iron Works* decision would be wrong.

2. THE DELAY HEREIN WAS NOT DUE TO "FLOODS," SINCE THE WORD "FLOODS" CONNOTES UNEXPECTEDNESS

The conclusion that anticipated high water can constitute "floods" within the intendment of Article 9 is erroneous.* There is authority to the

* The conclusion of the lower court that the high water herein constituted a flood is unsupported by the facts, which show only that it was "high water." The Court of Claims assumed (R. 19) that this high water overflowed the banks of the river, though not the levee. Even on this assumption this high water would not be a flood. "Flood waters are those which escape from a stream . . . and overflow the adjacent territory." *LeBrun v. Richards*, 210 Cal. 308, 315, 291 P. 825. To the same effect, see *Poole v. Sun Underwriters Ins. Co.*, 65 S. D. 422, 426, 274 N. W. 658; *Mogle v. Moore*, 16 Cal. (2d) 1, 9, 104 P. (2d) 785; *Webster's New International Dictionary* (2d ed.), p. 970. However, a reversal on this narrow ground alone would defeat the object for which the Government sought review. See Pet. 12, 13.

effect that the word "floods" does not include normal, seasonal high water." The context in which the word is used here strongly suggests that it was not intended to include such high water. Being used in connection with unforeseeable causes, the word must have been thought to refer to unforeseeable high water, not to normal, seasonal, and foreseeable high water. Therefore, the court below erred in concluding that the delay herein was caused by "floods" as that term is used in Article 9. That being so and the delay having in fact been foreseeable, the delay was not excused by Article 9 and the United States properly retained liquidated damages therefor.

CONCLUSION

For the foregoing reasons, therefore, it is respectfully submitted that the decision of the court below is erroneous and should be reversed.

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* *Herminghaus v. Southern California Edison Co.*, 200 Cal. 81, 88, 252 P. 607; *Mammoth Gold Dredging Co. v. Forbes*, 39 Cal. App. (2d) 739, 752, 104 P. (2d) 131.